(8)

Supreme Court, U.S.
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No. 00-9285

IN THE

Supreme Court of the United States

WALTER MICKENS, JR.,
Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The briefs of Virginia, the United States, and the Criminal Justice Legal Foundation all take the same basic tack and founder on the same shoal. They ask this Court to disregard the square holding of *Wood v. Georgia*, 450 U.S. 261 (1981), on the grounds that it was ill-considered, facile, written in shorthand, or too sloppily crafted to be taken at face value, as meaning what its explicit language says. They sugar-coat this effort to read *Wood* off the books by urging that if *Wood* means what it says, it overrules or modifies or incorrectly describes the rule of *Cuyler v. Sullivan,* 446 U.S. 335 (1980).

In so doing, all three briefs conspicuously fail to account for the prominent "Unless" Clause in the *Sullivan* opinion itself—the clause that anticipated the holding in *Wood* and was quoted in *Wood* because it speaks expressly to the situation in *Wood* (and in *Mickens)* where the presiding judge "knows or reasonably should know that a particular conflict exists" but fails to inquire into it. *Sullivan*, 446 U.S. at 347, quoted in *Wood*, 450 U.S. at 272 n.18. Virginia's brief tries to squeeze around *Sullivan*'s Unless Clause by emphasizing "*particular*" —which gets it nowhere at all because the nature of the *particular* conflict afflicting defense counsel in *Wood* and in *Mickens* was glaringly evident to the judges who, in each case, did not pause to inquire into it. Brief for Respondent at 22. CJLF's brief tries a different route around the Unless Clause, saying that it has to do only with the judicial duty of inquiry and not with the consequences of a failure to inquire—reading Parts IV(A) and IV(B) of the *Sullivan* opinion as two separate, logically unconnected and incommensurable opinions. Brief for CJLF at 15-16. The United States simply recites the Unless Clause in its description of the *Sullivan* opinion and thereafter turns a blind eye to it, leaving it unexplained, meaningless and completely inconsistent with its own one-eyed reading of *Sullivan* and this Court's Sixth Amendment rules. Brief of United States at 15.

Having obliterated—by blinking or prestidigitation—the crucial distinction drawn in *Sullivan* and again in *Wood* between cases in which the judge is on notice of defense counsel's potential conflict of interests and cases in which s/he is not, Virginia and its supporting *amici* proceed to make much of *Burger v. Kemp,* 483 U.S. 776 (1987), and *Burden v. Zant,* 498 U.S. 433 (1991), and 510 U.S. 132 (1994), without noting that these cases are in the latter category. Speaking, as they do, to situations in which it is **not** the case that the judge "knows or reasonably should know that a particular conflict exists," they present unremarkable applications of *Sullivan* and add nothing to the teachings of *Sullivan* relevant to Walter Mickens's case.

No legally competent reading of *Sullivan* and *Wood* can justify denying Mickens relief for an egregious violation of his Sixth Amendment right to be represented by conflict-free counsel.

CONCLUSION

The decision below denying Walter Mickens, Jr. post-conviction relief should be reversed.

Respectfully submitted,

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